Office - Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2152

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IRWIN WASSERMAN, et al.,

Petitioners,

v.

SYLVIA WASSERMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR CERTIORARI

STUART M. SALSBURY
ISRAELSON & JACKSON, P.A.
Suite 400 Jefferson Building
Charles and Fayette Streets
Baltimore, Maryland 21202

Attorneys for Respondent,
Sylvia Wasserman

No. 81-2152

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IRWIN WASSERMAN, et al.,

Petitioners

v.

SYLVIA WASSERMAN,

Respondent

MEMORANDUM OF SYLVIA WASSERMAN,
IN RESPONSE TO PETITION FOR CERTIORARI

QUESTION PRESENTED

Did the Fourth Circuit correctly hold that the trial court erred in dismissing this action for lack of subject matter jurisdiction based on the domestic relations exception to federal diversity jurisdiction where the action was solely for monetary damages arising from intentional torts and did not seek a determina-

tion of entitlement to custody, adjustment of family status or resolution of any true domestic relations claims.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals in this case appears at 671 F.2d 832 (4th Cir. 1982). The Memorandum Opinion of the District Court for the District of Maryland appears at page A-1 of the Appendix to the Petition for a Writ of Certiorari of Irwin Wasserman.

STATEMENT OF THE CASE

On July 30, 1980, Sylvia Wasserman sued Irwin Wasserman, Arlene Cornblatt Wasserman, Jacob Wasserman, Helen Ann Wasserman, Irwin Liptz, Armand Robinson and Murray Kivitz and the law partnership of Kivitz, Robinson and Liptz in an action stemming from the wrongful abduction of three of Mrs. Wasserman's children. The Complaint set forth three counts, child enticement, intentional infliction of emotional distress and civil conspiracy. The Complaint demanded compensatory and punitive damages. On May 12, 1981 the

District Court granted the Defendants' motions to dismiss for lack of subject matter jurisdiction. On February 24, 1982 the United States Court of Appeals for the Fourth Circuit reversed the District Court and remanded for the purpose of trial.

STATEMENT OF FACTS

The facts, as set forth in the Complaint and Election for Jury Trial, state that Sylvia Wasserman (Sylvia), is the former wife of Irwin Wasserman (Irwin). They are the parents of four minor children, Maia, Reana, Kyla and Liana. Arlene Cornblatt Wasserman (Arlene), is the present wife of Irwin, and Jacob Wasserman and Helen Ann Wasserman, are the parents of Irwin. Irwin Liptz, Armand Robinson and Murray Kivitz, and the partnership of Kivitz, Robinson and Liptz, were the attorneys of Irwin during the pertinent times and events which gave rise to this cause of action.

On June 8, 1976, by Decree of the Circuit Court for Montgomery County, Maryland,

Sylvia was granted custody of the minor Wasserman children during the pendency of the divorce proceedings between her and Irwin. The final Decree of Divorce between the parties was not granted until June 8, 1978.

On December 14, 1977, Irwin, without Sylvia's consent or knowledge, physically removed the three youngest children, Reana, Kyla and Liana, from Sylvia's custody, and, together with Arlene, with the knowing assistance of the other named Defendants, removed the children from the State of Maryland and traveled with them across the United States. During the period from December 14, 1977 to March 9, 1978, Irwin and Arlene, with the aid and assistance of the other Defendants, prevented the children from returning to Sylvia, concealed them from her, prevented them from contacting her regarding their location and well-being, and prevented her from locating and regaining custody of her children.

It is alleged that Irwin's motive for the abduction of his children was not one of love

or concern for the children, but rather, a strictly self-serving and avaricious one, the extorting of a favorable property settlement in the divorce proceedings from Sylvia as a ransom for the return of the children.

The suit does not ask for any revision of the property settlement, the custody decree, nor any aspect of the divorce proceedings in the Circuit Court for Montgomery County, Maryland. These domestic relation matters were adjudicated by that court and are not subjects of the Complaint.

The Complaint sets forth three causes of action, all intentional torts: (1) child enticement, (2) intentional infliction of emotional distress, and (3) civil conspiracy. The only relief requested is monetary in the nature of compensatory and punitive damages.

ARGUMENT

I. The holding of the Fourth Circuit that this action for monetary damages only based on intentional torts did not seek a determination of

entitlement to custody, adjustment of family status or any true domestic relations claims and thus did not fall within the domestic relations exception to federal diversity jurisdiction is not in conflict with the decisions of any other circuits since those decisions are clearly distinguishable and reconcilable with this case both factually and legally.

The case at bar is solely a tort action for monetary damages which does not seek any determination or revision of any domestic rights and which does not challenge the state court's prior divorce proceedings between these parties. It is not a domestic relations case and the domestic relations exception to federal diversity jurisdiction is neither apposite nor applicable.

Petitioners' argument that there is inconsistency between the Fourth Circuit's decision and decisions in the First, Third, Fifth, Sixth and Eighth Circuits completely ignores the factual and legal distinctions. Petitioners have taken the dicta in two early Supreme Court cases,

Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858), and In re Burrus, 136 U.S. 586 (1890), and erroneously have sought to apply it to all cases where the opposing parties happen to have been married regardless of the type of action brought or relief requested and have construed its application beyond the boundaries of subsequent decisional interpretations, all of which are unanimously in accord.

As the Fourth Circuit noted, "the federal courts have long held that diversity jurisdiction does not include the power to grant divorces, determine alimony or support obligations, or determine child custody rights," 671 F.2d 832, 834. Recognizing this and applying the guidelines espoused in Cole v. Cole, 633 F.2d 1083, 1087-89 (4th Cir. 1980) in interpreting the true nature of a potential domestic case, it distinguished the instant case as one alleging "generally cognizable common law torts" with none of the above proscribed domestic relations features. Specifically, it determined this

action (1) was "in no way dependent on present or prior family relations"; (2) "will not require the existence of any rule particularly marital in nature", (3) "could have arisen between persons with no marital relationship whatsoever and in fact [does so] in this case", (4) does not seek "a determination of entitlement to custody or any other adjustment to family status", (5) "does not involve a custody decree still subject to review and modification", (6) and will not require the court "to make a significantly . . . intrusive inquiry into the domestic relations of these parties."

The cases cited by Petitioner are unlike and distinguishable from the case at bar because they involve either the potential of inconsistency between state and federal adjudications or determinations of custody rights or collateral attacks on state divorce proceedings. All of these areas are clearly within the domestic relations exception and in no way contradictory to or in conflict with the

Wasserman case which is strictly a tort action for monetary damages. Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981) was determined to be a claim, under the guise of a civil rights action, which the court found "boils down to a demand for custody of the child" with an "obvious likelihood of incompatible state and federal decrees". Likewise, in Solomon v. Solomon, 516 F.2d 1018 (3rd Cir. 1975), it was determined that federal jurisdiction over a non-support suit where there was pending state court litigation would "undermine" and "derrogate" the state court's jurisdiction. There is clear dicta in that opinion that a federal court "might well assume jurisdiction" where a separation agreement is involved where "the custody of no child was involved, in which there was neither pending state court action nor an agreement to litigate in the state courts, and in which there was no threat that a feuding couple would play one court system against another." Id. at 1025. Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) also

involves a possible encroachment upon a state court's findings in a divorce proceeding. Although, because of its brevity, it is difficult to determine the background of Gargallo, it is obvious that the federal claim alleging perjury in the divorce proceeding seeks to collaterally attack the state court's divorce proceeding. It is interesting to note that in a prior case involving the same parties, the Sixth Circuit also invoked the domestic relations exception where the dispute centered over a declaration of present and future rights as to custody. Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.) cert. denied, 414 U.S. 805 (1973).

Overman v. United States, 563 F.2d 1287 (8th Cir. 1977), cited by Petitioners, also represents a case of attempted collateral attack of a state divorce decree in a federal forum. In remanding the case to the Missouri state courts, the federal court determined that this was merely an action brought by a spouse unhappy with a prior state adjudication, who sought "to

contest it by suing the government over a wage garnishment rather than challenging the divorce decree in an appropriate state forum". Id. at 1293.

Despite Petitioners' assertions to the contrary, the two Fifth Circuit decisions applying the domestic relations exception are not divergent holdings and, further, are in accord with the decisions in other circuits, including the Fourth. In Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) the Fifth Circuit acknowledged that despite the domestic nature of that case, it could exercise diversity jurisdiction over an action for alimony and child support arrearages in breach of a divorce decree. As authority for that holding, the court cited its prior decision in Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978), where it exercised jurisdiction in an action between former spouses for damages caused by breach of a voluntary separation agreement. The Fifth Circuit permitted the exercise of jurisdiction in Jagiella over the arrearage

issues even though questions of custody and parental rights were also raised, issues not present in Crouch. However, the court dismissed other actions brought, including a count for alienation of affections of the children, because a broader inquiry into the nature of this alleged tort action disclosed that it was merely "part of an ongoing series of disputes centering around the marital relationship". 647 F.2d at 565. Unlike Wasserman, the alleged tortious conduct in Jagiella arose from and was intertwined with a request to modify the divorce decree and visitation rights. Wasserman involves no such request for change in family status.

Since all of the alleged "inconsistent" cases cited by Petitioners are distinguishable factually and legally from the holding of the Fourth Circuit in Wasserman and since they are all reconcilable with that decision, there is no variance for this Court to reconcile. Further, there is no important issue of federal law ripe for review and settlement by this Court because

the domestic relations exception to federal jurisdiction is already well established and is inapplicable factually and legally to this case.

II. <u>There is no important issue of federal law which is ripe for review and settlement by this Court because this decision is a routine exercise of diversity jurisdiction and does not usurp areas of law historically under exclusive state jurisdiction</u>.

The decision below does not, as Petitioners contend, "usurp from the state one area of law historically under state jurisdiction". Pet. Brief at p. 12. State domestic relation courts, especially those in Maryland, do not and cannot grant the relief requested in this case. In Maryland, the domestic relations court sits as a court of equity, does not provide for a trial by jury and most importantly, cannot award monetary damages for tortious conduct involving estranged spouses. Petitioners' argument ignores the status and powers of the Maryland domestic

relations courts as well as the nature of the case and the type of relief requested. This case is not unlike myriads of other tort cases for monetary damages where diversity jurisdiction is routinely exercised.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Opinion of the United States Court of Appeals for the Fourth Circuit, a Writ of Certiorari should not be granted.

Respectfully submitted,

Stuart M. Salsbury
Israelson & Jackson, P.A.
Suite 400 Jefferson Building
Charles and Fayette Streets
Baltimore, Maryland 21202

Attorneys for Respondent,
Sylvia Wasserman